IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No.

FRANK XAVIER FRANCISCO, Petitioner,

v.

J. S. GATHRIGHT, Superintendent, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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November, 1973

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Frank Xavier Francisco, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on August 27, 1973.

Opinions Below

The memorandum opinion of the Court of Appeals, not officially reported, appears in Appendix A hereto at 1a. The order of the United States District Court for the Eastern District of Virginia, at Alexandria, appears in Appendix A hereto at 4a.

Jurisdiction

The judgment of the Court of Appeals was entered on October 5, 1973. No petition for rehearing was filed, and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether a person in custody pursuant to the judgment of a State court who has presented a claim to the State courts in the course of the direct criminal proceedings, is to be denied federal habeas corpus relief merely because the State Supreme Court has rendered a subsequent decision in another case which confirms that his claim is meritorious.

2. Whether a person in custody pursuant to the judgment of a State court who claims that such custody is, in two independent respects, in violation of the Constitution of the United States, must await federal habeas corpus relief on one ground merely because the other ground should have been presented to the State courts.

Constitutional Provisions

Amendment IV

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

Amendment XIV, Section 1

". . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law;

nor deny to any person within its jurisdiction the equal protection of the laws."

Statutory Provisions

Petitioner was prosecuted under Section 54-524. 101(a) of the 1950 Code of Virginia, as amended prior to 1972, which provided as follows:

> "§54-524. 101. Unlawful acts; penalties -- (a) Except as authorized by this chapter, it shall be unlawful for any person knowingly or intentionally:
> "(1) To distribute, or possess with intent to distribute a controlled drug.
> "(2) To manufacture a controlled drug.
> "A conviction for a violation of this §54-524. 101(a) may be based solely upon evidence as to the quantity of any controlled drug or drugs unlawfully possessed."

Petitioner sought post-conviction relief under 28 U.S.C. §§2241, et seq. These statutory provisions are somewhat lengthy and are set forth in Appendix B hereto.

Statement of the Case

This case involves important procedural questions concerning the rights of persons held in custody pursuant to a judgment of a State court to a speedy and efficient adjudication of the lawfulness of such custody under the Constitution of the United States. Since petitioner's claims have not been adjudicated on the merits by the Court of Appeals, a brief sketch of his substantive claims will suffice for purposes of this petition.

Petitioner Frank Xavier Francisco was arrested in the bedroom of his apartment, following the warrantless, forcible entry by Investigator William Luzi and other officers of the Fairfax County, Virginia, Police Department, shortly after midnight on February 28, 1971. At that time a quantity of heroin was seized from his person and from atop a dresser

in the room. Another individual present in the apartment, known to Luzi as a narcotics addict was released without charges placed against him. Petitioner was immediately taken before a Justice of the Peace for an initial appearance and held in the Fairfax County Jail in lieu of money bond. Petitioner's arrest was predicated on an informer's tip and Luzi's observations through the curtained window in the living room of petitioner's apartment. The informant, Robert DeBruin, who then had narcotics charges pending against him, had several hours earlier communicated to Luzi that petitioner had purchased heroin and was "cutting it up" for distribution. Pursuant to plan, DeBruin entered petitioner's apartment with marked money, purportedly to purchase drugs, at about half-past midnight. DeBruin had agreed to pay petitioner for the drugs with the marked money in front of the window if he observed the narcotics on the premises. He was then to lock himself in the bathroom to impede destruction of the heroin. When Luzi observed DeBruin hand the money to petitioner he knocked on the apartment door and upon an occupant's refusal to admit him, forced the door open. Unknown to the officers, DeBruin had not observed any drugs in the apartment, but had paid petitioner to settle a debt. Nothing passed from petitioner to DeBruin.

Petitioner was charged with the unlawful possession, with intent to distribute, a controlled drug, heroin, and was incarcerated prior to trial by reason of his inability to make bond. Prior to trial, petitioner moved to suppress the narcotics seized on the grounds that his arrest was not supported by probable cause and that the officer's failure to secure a warrant was not excused by exigent circumstances. One week before the scheduled trial date of May 28, 1971, a hearing was held on the motion to

suppress. The motion was taken under advisement and, on the morning of trial, denied.

At trial, the Commonwealth's witnesses were Luzi, a chemist, and DeBruin. Luzi testified as to the events immediately surrounding the arrest and seizure; the chemist identified the material seized as heroin. DeBruin testified that petitioner had agreed to sell heroin to him that evening and had sold heroin to him on one previous occasion. The defense presented evidence that both petitioner and DeBruin were addicted to heroin, and that DeBruin's reputation in the community for truth and veracity was poor. Petitioner did not testify in his own behalf. In the course of its charge to the jury, the court instructed them, over defense counsel's objection, of the statutory presumption that "a conviction for possession of a controlled drug with intent to distribute may be based solely upon the evidence as to the quantity of the controlled drug possessed." The jury returned a verdict of guilty on the offense charged, sentencing petitioner to eight year's imprisonment at hard labor.

Petitioner sought appellate review of his conviction by petitioning the Supreme Court of Virginia for writ of error and supersedeas. Among the grounds for appeal were (1) that he was arrested and the drugs seized in violation of the Fourth Amendment in that the warrantless, forcible entry into petitioner's dwelling to effect his arrest was not based on probable cause or required by exigent circumstances and (2) the above-quoted instruction was based on a presumption without rational basis, thereby denying petitioner due process. In a per curiam order dated December 14, 1971, the Supreme Court of Virginia declined to review petitioner's conviction.

In October 1972, petitioner commenced this habeas corpus proceeding in the United States District Court for the Eastern District of Virginia, at Alexandria. As grounds for the relief sought, petitioner presented the arrest and seizure claim and the instruction claim previously presented to the state courts. The Commonwealth was ordered by the district court to show cause why the writ should not be granted. In its answer filed November 11, 1972, the Commonwealth admitted that petitioner had exhausted his state remedies on both claims. It contended, however, that petitioner should again present to the state courts the question of the constitutionality of the challenged instruction. This contention was predicated on the decision of the Supreme Court of Virginia handed down some one month earlier, Sharp v. Commonwealth, 213 Va. 269, 192 S.E. 2d 217 (1972), invalidating the instruction on state and federal constitutional grounds. The district court entered summary judgment against petitioner, ruling against him on the merits of the Fourth Amendment claim and declining to reach the merits of the challenge to the instruction. In dismissing the latter claim without prejudice, the district court although expressly acknowledging that petitioner "has exhausted his remedies before on this issue," agreed with the Commonwealth's contention that the instruction claim "should be left to the state courts." Petitioner noted his appeal from this decision and a certificate of probable cause was granted by the district court. The United States Court of Appeals for the Fourth Circuit under Rule 7 of its local rules, considered the case without briefs or oral argument. On August 27, 1973 it issued a memorandum decision affirming that part of the district court's order which relegated the instruction claim and vacating the district court's resolution of the merits of the Fourth Amendment claim.

to provide an indigent defendant with a free transcript was unconstitutional. The district court rejected Roberts' claim on the merits. While his appeal from that decision was pending, the highest court of the state held that, as a matter of constitutional law, indigent defendants are entitled to a free transcript of their preliminary hearing. The court of appeals, while acknowledging that Roberts had exhausted his state remedies, "thought the constitutional necessity for federal court intervention was 'open to doubt' and that 'the question ought to be decided in favor of permitting a state court determination in the first instance' " 389 U.S. at 41. Accordingly, as did the district court below, it dismissed the petition without prejudice to renewal following the state court proceedings. This Court vacated the court of appeals decision, noting that "[s]till more state litigation would be both unnecessarily time consuming and otherwise burdensome." 389 U.S. at 43. As in Roberts, there is no substantial state interest in ruling once again on petitioner's instruction claim; there is no reason shown why the Commonwealth wishes to burden its judicial system with an issue which is governed by established federal principles. In deciding Sharp v. Commonwealth, the Supreme Court of Virginia relied on no intervening change in federal or state law. The state court decisions cited on the point antedated petitioner's state appellate proceedings by at least eight years. This Court's decision in Leary v. United States, 395 U.S. 6 (1969) was relied upon by the Supreme Court of Virginia to invalidate the challenged instruction on due process grounds as a presumption without rational basis; the excerpt from Leary quoted in Sharp was identical to that which petitioner had quoted in his petition for writ of error. In short, the decisions below are in irreconcileable conflict with Roberts v. LaVallee, supra.

Reasons for Granting the Writ

A. In affirming the district courts refusal to reach the merits of a claim upon which petitioner had exhausted his state remedies, the United States Court of Appeals has decided an important federal question in a way in conflict with the applicable decisions of this Court.

The decisions of the Courts below squarely conflict with this Court's decision in Roberts v. LaVallee, 389 U.S. 40 (1967) and the consistent holdings of this Court that a person seeking federal habeas corpus relief need only have presented his case once to the state courts. The courts below have interposed needless procedural hurdles to the resolution on the merits of claims first presented to the state courts more than two years ago. A person seeking relief in federal court from an unconstitutional state court conviction may properly be required to exhaust his state remedies. He should not be required to exhaust himself by becoming a ping-pong ball batted back and forth between two judicial systems. The Commonwealth's position, adopted by the district court and the court of appeals, is that the effect of the tardy recognition by the Supreme Court of Virginia of well-established constitutional principles is to require petitioner, whose assertion of identical principles before that court was summarily to again assert those claims in the state judicial system. That position has been consistently rejected by this Court.

Roberts v. LaVallee, supra, involved virtually the identical factual situation to that presented in the instant case. The state trial court had rejected Roberts' request for a free transcript of his preliminary hearing. After conviction and exhaustion of direct appellate review, Roberts collaterally attacked his conviction in federal court on the ground that the refusal

Roberts is in accord with the well-established principle that while state courts are to be given an initial opportunity to pass upon and correct violations of constitutional rights, petitioners are not required to make repetitious applications for relief to state court. See Wilwording v. Swenson, 404 U.S. 249, 250 (1971); Brown v. Allen, 344 U.S. 443 (1953). This Court has rejected "procedural hurdles to the achievement of swift and imperative justice on habeas corpus" see Fay v. Noia, 372 U.S. 391, 435 (1963), and has recognized that "a principal aim of the writ is to provide for swift judicial review of alleged unlawful restraints on liberty." see Peyton v. Rowe, 391 U.S. 54, 63 (1968). Resolution of petitioner's claim has hardly been swift. Some two and one-half years has elapsed since petitioner's conviction; his petition for writ of habeas corpus was filed more than one year ago. The Commonwealth should not be permitted to interpose the further delay incident to state habeas corpus proceedings and any appeals therefrom.

B. In refusing to consider the merits of petitioner's independent claim for relief upon which no question of exhaustion of remedies existed, the Court of Appeals has rendered a decision in conflict with the decisions of the Court of Appeals for the Second and Eighth Circuits and has decided an important question of federal law which has not been but should be settled by this Court.

The Court of Appeals in the instant case held that the merits of petitioner's Fourth Amendment claim should not be reached because his independent claim for relief predicated on an unconstitutional instruction should be considered by the State courts. In so doing, the court rendered a decision in conflict with the decisions in Tyler v. Swenson, 483 F. 2d 611

(8th Cir. 1973), and United States ex rel. Levy v. McMann, 394 F. 2d 402 (2d Cir. 1968). Moreover, the decision below interposes a significant and unnecessary delay in the final resolution of claimed deprivations of constitutional rights. This Court has not squarely determined the proper procedure to be followed where a petition for writ of habeas corpus asserts independent claims for relief. This is an important question which should be settled.

In Levy, supra, the United States Court of Appeals for the Second Circuit held that a petitioner for federal habeas corpus relief has a right to a decision on the merits of claims for relief upon which State remedies have been exhausted notwithstanding the presence in the petition of claims for relief which have not been presented to the state courts.[1/] As noted by the Court in Levy, "dismissal of the entire petition would be, at best, a waste of petitioner's and the State's time and, at worst, so frustrating that petitioner having exhausted his energies, might submit to the alleged injustices." 394 F. 2d at 404. In Tyler, supra, the Eighth Circuit aligned itself with the Second, following Levy. See 483 F. 2d at 614-15. While the Court of Appeals below had earlier indicated agreement with Levy, see Hewett v. North Carolina, 415 F. 2d 1316, 1320 (4th Cir. 1969), the decision below represents a retreat from that position. The Third Circuit has held that the pendency in state court of a collateral attack based on grounds independent of those asserted in federal courts does not relieve the federal court of its obligation to hear and determine the claim presented to it. See United States ex rel Boyance v. Myers, 372 F. 2d 111, 112 (3d Cir. 1967). It thus appears that the Third Circuit would follow Levy. It is submitted that the decision in Levy is in keeping with this Court's

1/ The Fifth Circuit has taken a contrary position. See Wheeler v. Beto, 407 F. 2d 816 (5th Cir. 1969).

removal of procedural barriers which impair a state prisoner's right to swift relief from unconstitutional conviction. Thus, Peyton v. Rowe, 391 U.S. 54 (1968), saw the demise of the rule that an attack on a later consecutive sentence was not to be deferred until the prisoner began to serve that sentence.

In the instant case, petitioner's claims for relief are completely independent. More importantly, a decision on the arrest and seizure claim favorable to petitioner will, as a practical matter, preclude the Commonwealth from retrying him. On the other hand, the constitutional defect in the trial caused by the challenged instruction can be remedied by a new trial. Petitioner has been incarcerated for some two and one-half years. Must he await the outcome of a collateral attack on his conviction in state court and, if successful, retrial and direct appeal before he can have an adjudication on the merits of his arrest and seizure claim? If petitioner establishes that his conviction rests on Constitutionally tainted evidence "each day he is incarcerated under that conviction while his case is in the courts will be time that he might properly have enjoyed as a free man." See Peyton v. Rowe, supra, 391 U.S. at 64.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinions Below

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 73-1313

FRANK XAVIER FRANCISCO,

Appellant,

versus

J. S. GATHRIGHT, Supt.
Bland Correctional Farm,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Submitted: May 14, 1973 Decided: AUG 27 1973

MEMORANDUM DECISION

Frank Xavier Francisco, a Virginia prisoner, seeks a certificate of probable cause to appeal a district court order denying his petition for a writ of habeas corpus.

Francisco was convicted of possession, with intent to distribute, of a controlled drug (heroin) in violation of Va. Code Ann. § 54-524.101(a). In his petition for federal habeas corpus relief he alleged that his arrest occurred without probable cause and that the subsequent search

exceeded its permissible scope. He also contended that the statutory presumption relating to possession with intent to distribute is unconstitutional. The state admitted that Francisco had presented these claims in his petition for a writ of error to the Virginia Supreme Court which denied review and affirmed the conviction by order on December 14, 1971. Subsequently, however, in the case of Sharp v. Commonwealth, 213 Va. 269, 192 S. E. 2d 217 (1972), the Virginia Court held the statutory presumption to be unconstitutional and the state has admitted that Francisco's claim relative to the constitutional issue may now have merit under Sharp. However, the state asked that Francisco be required to submit his claim to the state courts since Sharp was decided after the State Supreme Court's denial of review in his case.

The district court agreed with the state "that it should be left to the state courts to determine whether the petitioner's case is controlled by Sharp." We affirm this holding. If the state does not comply with the mandate of the district court, Francisco can reapply to the district court for relief. We feel, however, that the district court was premature in reaching the merits of Francisco's allegations of illegal arrest and illegal search and seizure. If relief is granted under Sharp, the state will have the

option of releasing Francisco or retrying him. In either event the possibility exists that this claim for relief will be mooted.

We therefore vacate that portion of the district court opinion denying relief on the claims of illegal arrest and illegal search and seizure, and direct the district court to dismiss these claims without prejudice. Francisco will therefore be free to reassert this claim if it is not mooted by further proceedings on his claim for relief under Sharp.

Accordingly, a certificate of probable cause to appeal is granted, the judgment of the district court is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

Clement F. Haynsworth, Jr.

Chief Judge, Fourth Circuit

A True Copy, T e s t e:

William K. Slate, II, Clerk

By Diane Burke
Deputy Clerk

/s/ H. E. Widener, Jr.
United States Circuit Judge

United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

FRANK XAVIER FRANCISCO, Petitioner,	)	
V.	)	CIVIL ACTION NO. 430-72-A-M
J. S. GATHRIGHT, Superintendent Bland Correctional Farm, Respondent.	)	

ORDER

Frank X. Francisco attacks his state conviction for failure to suppress the evidence in that he alleges his arrest occurred without probable cause absent exigent circumstances and that the subsequent search exceeded its permissible scope. Moreover, he contends that an unconstitutional instruction relating to possession of narcotics with intent to distribute was improperly submitted to the jury.

An examination of the transcript of the suppression hearing (M. Tr.) and trial (T. Tr.) reveals that on February 27, 1971, Robert DeBruin informed Officer Luzi of the Fairfax County Police Department that the petitioner, Frank X. Francisco, possessed heroin and was in the process of cutting it up for distribution. (M. Tr. 20, 21) DeBruin admitted that he personally had previously purchased drugs from Francisco and was invited to procure more that evening. (M. Tr. 21, 25) DeBruin, moreover, was known to Luzi as being a drug addict with two

recent arrest charges still pending against him for the sale and control of narcotics. (M. Tr. 17, 18) Luzi contended that DeBruin had indirectly given reliable information in the past although he did not specify the nature of the earlier complaints. (M. Tr. 8, 20) He had also indicated to DeBruin that the latter's present assistance would be brought to the attention of the Commonwealth Attorney. [DeBruin even testified at the preliminary hearing that he acted as an informer "to clear" himself of drug charges with the understanding that something might be done for him if he helped. (T. Tr. 49, 52)]

Relying upon the information obtained from DeBruin, Luzi arranged a meeting with him for midnight outside of Francisco's apartment. At that meeting DeBruin was instructed to obtain entrance into the apartment and endeavor to purchase drugs with marked money which he was given. The police positioned themselves outside of the window of the apartment with the understanding that an observation, as seen through the thin curtains, of the passing of money from DeBruin to Francisco would be a signal to show that narcotics were visible and accessible. (M. Tr. 8, 26) The arrest was then to be based on this pre-arranged signal, that is, the "pass," although it was not contended that anyone saw Francisco hand DeBruin anything in exchange for the marked bills and no testimony indicated that DeBruin had actually seen heroin for sale in the apartment at the time of the signal. (M. Tr. 22, 25) [As a matter of fact, DeBruin testified at the trial that the initial

exchange of money observed by the police outside of the window was the payment of a prior debt for drugs and not a new purchase. (T. Tr. 38, 41)]

Soon after DeBruin entered the apartment he made the "pass" by the window which then prompted the police to enter the apartment to arrest Francisco. Another person met the police at the door and attempted to prevent them from entering. The police proceeded to push through the door and arrest the defendant in the back bedroom. They confiscated ten (10) decks of heroin on his person and thirty-eight (38) more on a bureau near him. (M. Tr. 12, 13)

Evidence obtained by a search in violation of a defendant's constitutional rights is inadmissible. Mapp v. Ohio, 367 U.S. 643 (1961). Therefore, before a warrantless arrest is deemed proper, the prosecution must establish that probable cause existed for the arrest and that exigent circumstances obviated the requirement to procure a magistrate's independent judgment. Beck v. Ohio, 379 U.S. 95, 97 (1964); McDonald v. United States, 335 U.S. 451, 456 (1948). The lawfulness of a warrantless arrest, however, cannot be based on the reliability of an unknown informer. Katz v. Peyton, 334 F. 2d 77 (4th Cir.), affirming, 232 F. Supp. 131 (E. D. Va.), cert. denied, 379 U.S. 915 (1964), rehearing denied, 379 U.S. 984 (1965). Corroboration of "the essential particulars," though, by an investigation prior to arrest may be sufficient to establish probable cause. United States v. Irby,

304 F. 2d 280 (4th Cir.), cert. denied, 371 U.S. 830 (1962).

In Aquilar v. Texas, 378 U.S. 108 (1964), the Court established a two-pronged test to measure the effect of an informant's reliability on a police officer's determination of probable cause. It must affirmatively appear to a neutral and detached magistrate that the officer was informed of some of the "underlying circumstances" from which it could be concluded that the informant was reliable and the information credible. There is a three-tiered method of analysis for testing the validity of an informant's conclusions. First, the information can be corroborated by the informant's knowledge of minute detail and particularity. Secondly, direct personal observation can assure first-hand knowledge of facts rather than mere suspicion or rumor. And finally, actual participation in the illegal activity carries its own degree of credibility since it is a declaration against penal interests.

Credibility and reliability can further be ascertained by an affiant's averment that the informant was known and has proven himself by having previously furnished other information which was instrumental in procuring convictions. Moreover, the affiant's own knowledge of the alleged suspect's reputation or subsequent observation of incriminating actions by the suspect may corroborate an informer's accusation. See Spinelli v. United States, 393 U.S. 410 (1969); Manley v. Commonwealth, 211 Va. 146, 176 S.E. 2d 309 (1970).

The standards where police act without a warrant are at least as stringent as those required for an affidavit. Aquilar, supra, at 111; Whiteley v. Warden, 401 U.S. 560 (1971); McCray v. Illinois, 386 U.S. 300, 305 (1967); Wong-Sun v. United States, 371 U.S. 471, 479 (1963). The mere existence of probable cause is not sufficient to justify non-compliance with the warrant procedure. Coolidge v. New Hampshire, 403 U.S. 443, 451 (1971); Angello v. United States, 269 U.S. 20, 33 (1925). It is fully recognized that:

> The most basic constitutional rule in this area is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions." The exceptions are "jealously and carefully drawn," and there must be "a showing by those who seek exemption ... that the exigencies of the situation made that course imperative." "[T]he burden is on those seeking the exemption to show the need for it." (Citations omitted.) Coolidge, supra, at 455.

In reviewing the evidence presented at the suppression hearing in the case at bar, the basic issue is when probable cause was sufficiently established. The only proof apparent, prior to the window observation, to support the two-prong test of Aquilar was the informant DeBruin's admission against his penal interests that he had purchased narcotics in the past from the suspect Francisco. (M. Tr. 21) United States v. Harris, 403 U.S. 573 (1971). Additionally, there was DeBruin's statement

that Francisco had told him he had recently bought a quarter pound of heroin and would sell him some if interested. (M. Tr. 20, 25) [Another informer, Carcio, also told the police the same story but it carries no extra weight since his information came from DeBruin. (M. Tr. 9)] There was not, however, any testimony that DeBruin had personally observed narcotics on Francisco or in his apartment prior to entering his home the night of arrest.

Officer Luzi did make the bare statement that DeBruin, known only at that point as a drug addict, had "indirectly" given reliable information in the past. (M. Tr. 8) This did little to support the informant's credibility and reliability since he did not specify the nature of the underlying circumstances of the earlier complaints. (M. Tr. 17, 18, 20) There was no evidence either that the information supplied as to other cases was instrumental in securing any convictions. To establish credibility and reliability, more than a mere assertion that an informer has given reliable information before is needed to provide a factual basis for crediting his report. United States v. Harris, supra, at 579; Riggan v. Virginia, 384 U.S. 152 (1966); Wiles v. Commonwealth, 209 Va. 282, 163 S.E. 2d 595 (1968). While it is further recognized that a police officer's (or affiant) own knowledge of a suspect's reputation can corroborate the truthfulness of an informant's accusation, "a bald and unilluminating assertion of suspicion," standing alone, is entitled to no weight.

Spinelli, supra, at 414; Nathanson v. United States, 290 U.S. 41, 46 (1933). Such was the case here since Luzi did not know the suspect personally but only by way of some unexplained "police department complaints." (M. Tr. 7)

It is similarly difficult to find that the act of passing the money in front of the window in itself corroborated the veracity of DeBruin's initial assertions for there was no incriminating conduct on the part of the suspect. Moreover, an informer's tip cannot be sustained by activities which "contain no suggestion of criminal conduct when taken by themselves -- and they are not endowed with an aura of suspicion by virtue of the informer's tip." Spinelli, supra, at 418; Nathanson, supra.

While each stage of material proof, standing alone, failed to substantiate a showing of probable cause the totality of circumstances affirmed such a finding. First the declaration against penal interests by DeBruin of his involvement in criminal activity carried its "own indicia of credibility - sufficient at least to support a finding of probable cause to search. That the informant may be paid or promised a break does not eliminate the residual risk and opprobrium of having admitted criminal conduct." Harris, supra, at 583, 584. Luzi's statements, although vague, that DeBruin had given reliable information in the past and that some form of unspecified complaints had at least been received before on Francisco deserved some weight, if only slight, as being corroborative when balancing

the probabilities. Finally, the passing of the money, when viewed by the police, served a legitimate purpose in that it was an action by DeBruin to signal to Officer Luzi that he, DeBruin, had now personally observed narcotics in Francisco's possession, an element not previously confirmed. (M. Tr. 8, 26) It is immaterial whether DeBruin had actually seen the drugs present or not, for what the police believed to be the interpretation of his signal is the subject of analysis. At this moment the test for the sufficiency of probable cause to arrest was ultimately fulfilled.

Whether the observation itself constituted an illegal search is another issue. Technically it was not a trespass to search the suspect or his premises but a procedure to enable the police to view a "signal" from the informant for the purpose of corroborating prior averments. It would have been no different than had the police waited for DeBruin to return from the apartment and confirmed his earlier allegation with direct personal knowledge. It is obvious that Francisco was not relying on the security of his apartment but rather upon his misplaced confidence that DeBruin would not reveal his wrongdoing. DeBruin was not a surreptitious observer but an invited guest who was knowingly given entry and the opportunity to view the contraband. Hoffa v. United States, 385 U.S. 293 (1966). See also, United States v. White, 401 U.S. 745 (1971). Since

this observation was a method for executing a plan to view only the actions of the informant, no constitutional infirmity exists because the validity of the arrest was not bootstrapped by an unlawful search of the suspect. "The Fourth Amendment protects people, not places." Katz v. United States, 389 U.S. 347 (1967).

The assumption that the police had ample time to procure a warrant must also fail. Although there was not a substantial basis for a warrant to issue initially, the sufficiency of probable cause to arrest did arise at the apartment after the signal was given by DeBruin to the police. The realities of narcotic dealing then dictated that an arrest be pursued immediately. Since narcotics are easily disposed of either by destruction or sale, even late at night, "exigent circumstances" almost invariably exist. (M. Tr. 10, 26) Therefore immediate warrantless arrests based upon probable cause are imperative. United States v. Irby, supra.

Once it was established that the police lawfully entered the apartment to arrest the defendant then a search incident to that lawful arrest was legal. Trupiano v. United States, 334 U.S. 699 (1948). "It has long been settled that objects falling in plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." Harris v. United States, 390 U.S. 234 (1968). The thirty-eight (38) decks of heroin

were easily recognizable as contraband since they were in transparent plastic bags on top of the dresser in the defendant's bedroom where he was arrested. (M. Tr. 13, T. Tr. 18)

Finally, Francisco attacks the constitutionality of the statutory presumption relating to possession with intent to distribute. The respondent admits in his answer that this allegation has merit in light of Sharp v. Commonwealth, 213 Va. 269, 192 S.E. 2d 217 (1972), and suggests that it should be left to the state courts to determine whether the petitioner's case is controlled by Sharp. This Court agrees and, provided the Commonwealth on its own initiative, affords the petitioner a hearing within forty-five (45) days on this issue, this matter is dismissed without prejudice. However, in light of the fact that Francisco has exhausted his remedies before on this issue, albeit prior to the decision in Sharp, leave is given petitioner, should such a hearing not be conducted, to apply to this Court for reinstitution of this action in order to have this Court consider the issue on its merits.

Accordingly, relief is denied on all grounds raised by the petitioner and it is ORDERED that summary judgment be granted in favor of the respondent.

The petitioner is advised that should he desire to appeal, written notice of appeal must be received by the Clerk of this Court within thirty (30) days from the date of this Order. In default of such notice, the Clerk is requested to return the state court records to the Clerk of the Circuit Court of Fairfax County.

The Clerk is further directed to send a copy of this Order to the petitioner, his counsel, the respondent and the Attorney General of Virginia.

/s/ [illegible]
United States District Judge

Alexandria, Virginia
January 23rd, 1973

APPENDIX B

Text of 28 U.S.C. §§2241 et seq.

§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

§ 2242. Application

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making application to the district court of the district in which the applicant is held.

§ 2243. Issuance of writ; return; hearing; decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

§2254 cont'd

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.